

Ask the Dust

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Last week, the European Court of Human Rights (ECtHR) condemned France for violating Article 3 of the Convention, by reducing asylum seekers to destitution in such an intensity that it constitutes a degrading treatment. It asserts that the French authorities failed to fulfill their obligations under national law against three of the plaintiffs (the Russian nationals *N.H.* – App. n° 28820/13 – and *K.T.* – App. n° 75547/13 -, as well as the Iranian national *A.J.* – App. n° 13114/15 -). According to the Court, the national authorities must be held responsible for the conditions in which they left the considered asylum seekers, who lived for months on the street, without any resources, without any access to sanitary facilities, without any means of providing for their basic needs and in the constant anguish of being attacked and robbed; and the third country nationals soliciting international protection must be seen as “victims of degrading treatment that shows disrespect for their dignity (§ 184)”.

It is the fifth time since the *Jamil Khan* case that France is condemned by the ECtHR for violating Article 3 of the Convention (28 February 2019, *Khan v. France*, App. n° 12267/16 ; see Marie-Laure Basilien-Gainche, « [Children of Men. Comments on the ECtHR's Judgment in Khan v. France](#) », *Verfassungblog*, 12 March 2019). One case dealt with the failure of the child protection system (4 June 2020, *Association Innocence en danger et Association Enfance et partage v. France*, App. n°15343/15 & 16806/15); two with the inhumane way in which prisoners are detained and treated (30 January 2020, *J.M.B. v. France*, App. n° 9671/15, 9674/15 and 9679/15 & 5 December 2019, *J.M. v. France*, App. n° 71670/14); and two with the situation of migrants, one concerning unaccompanied minors (25 June 2020, *Moustahi v. France*, App. n° 9347/14) and one relative to the conditions of destitution asylum seekers found themselves for months (the here presented *N.H. & alii v. France* case, App. n° 28820/13, 75547/13 & 13114/15).

When leaving asylum seekers in a destitute condition constitutes a degrading treatment

In the *N.H.* case, the ECtHR was asked if the situation of the plaintiffs was similar to the one of *M.M.S.*, an Afghan asylum seeker who was transferred by the Belgian authorities – according to the Dublin II Regulation – to Greece where he was left destitute by Hellenic authorities (ECtHR, GC, 21 January 2011, *M.M.S. v. Belgium & Greece*, App. n° 30696/09). Though the prohibition encapsulated by Article 3 is absolute (§ 156 & § 157), the judge needs to develop an appreciation of the facts that is actually subjective, in order to determine if the severity of the facts meets the minimum threshold to constitute inhumane and degrading treatment: he must take into account the duration of the situation, its implications both physical and mental, as well as the sex, the age and the condition of the alleged victim (§ 158).

Previous cases the ECtHR dealt with gave some indications. Leaving an 11-year old Afghan boy alone in the Calais jungle for six months met the threshold to constitute a degrading treatment (28 February 2019, [Khan v. France](#), App. n° 12267/16) – a recent decision of the French Supreme administrative court appears to integrate the ECtHR recall of the obligations the national authorities need to fulfil (CE, 8 July 2020, [App. 425310](#)). But failing to offer an accommodation during 40 nights to an unaccompanied minor who was not recognized as such by the authorities did not (10 October 2019, [M.D. v. France](#), App. n°50376/13).

Was the threshold reached in the cases of N.H., K.T. and A.J. who were young men, in relatively good health not in charge of a family, as underscored by the French government? Yes, it was according to the Court, because the plaintiffs remained without any resources for months (during 262, 185 and 133 days respectively); endured living in the street (during 262, 270, and 170 days); stayed frightened to be arrested and returned, as they did not dispose of documents proving they applied for asylum (during 95, 131 and 90 days). As the Court underscores, as asylum seekers, the plaintiffs were not authorised to work; therefore, they depended entirely on the physical and financial support provided for by national law which was to be granted to them as long as they were allowed to remain in the territory as asylum seekers (§ 167); henceforward, during all the time they remained without financial support, they could only rely on the generosity of individuals or the help of volunteer-based charities to meet their basic needs (§ 179).

Such a condition of destitution is the consequence of the delays that pace the different steps of an asylum claim application, and whose minimum durations established by law are far from being observed in practice, as the national authorities do not have enough agents to ensure their respect: delay for considering the request for being admitted to a resident permit under asylum application; delay for registering the asylum application in the *Préfecture*; delay for obtaining the receipt for lodging an international protection claim; delay for receiving the resident permit as asylum seeker; delay for getting the transfer of financial aids; delay for examining the asylum application itself. In consequence, asylum seekers have waited for dignified living conditions for months, being left in the dire situation of destitution on the streets.

Yet, French national legal order, as established by norms that incorporate the provisions of EU Directives (the Asylum Procedure Directive and the Reception Conditions Directive), requires the authorities to provide decent accommodation and material conditions for asylum seekers.

How the ECtHR refers to the national legal order to issue France's condemnation

Although the Court mentions that Article 3 of the Convention should not be interpreted as requiring the States to guarantee a right to accommodation and to provide financial resources for all refugees (§ 160), it reminds French national authorities of their legal obligations under their own domestic law. Two points must be highlighted. First, French norms establish delays whose maximum duration is enounced: nowadays (since Article 10 of the [Act n°2018-778](#) of 10 September

2018 came into force), 3 days that can be extended to 10 days in case of numerous simultaneous asylum applications ([Article L. 741-1 CESEDA](#)). Second, such periods are considered by the Supreme administrative court as constituting obligations not of means but of result (Conseil d'Etat, 28 December 2018, [App. n° 410347](#)). Thus, the Strasbourg Court notes that French national authorities violate their result obligation under national law so severely that they must be regarded as responsible of the implications of such infringements. In other words, the Court condemned France because the national authorities did not respect their own legal order, appreciating henceforward the violation of the conventional requirements through the prism of national law.

Furthermore, the Court asserts that the result obligation to respect the period established by law cannot be softened. Two elements are developed by the Strasbourg judges: national authorities cannot call up difficulties a humanitarian emergency creates, as far as there was no migratory crisis occurring in France at the time in question (§ 182); and even if such a crisis had occurred, national authorities cannot be exonerated of their legal obligations by mentioning an increase of migrant arrivals (§ 157). Meanwhile, the ECtHR refutes the traditional position the administrative French judges are adopting in their decisions, which was established by the *Conseil d'Etat* in an order of May 10th, 2012 ([App. n° 358828](#)). The administrative judges argued that the periods for dealing with each of the steps of the examination of an asylum application is reasonable, taking into account the limited resources available to the authorities (see *N.H.* case, order of 19 April 2013, § 7; *S.G.* case, order of 17 October 2013, § 25; affaire *A.J.* case, order of 13 November 2014, § 52). But the ECtHR opposes the way French judges have been rejecting for years remedies that have been introduced to require the administration of provide decent accommodation and financial assistance for asylum seekers (§ 151).

We can mention here the constructive dialogue between the ECtHR on the one hand and the Court of Justice of the European Union (CJEU) on the other hand. It appears clearly that the Strasbourg judges mention and widely quote two major decisions the Luxembourg court issued on this topic: the *Cimade & Gisti* case (27 September 2012, *Cimade & Gisti*, C-179/11 ; see Marie-Laure Basilien-Gainche, « [Droit d'asile \(Directive 2003/09/CE\) : Obligation d'octroi des conditions minimales d'accueil aux demandeurs d'asile « dublinés »](#) ») and the *Saciri* case (27 February 2014, *Saciri*, C-79/13 ; see Marie-Laure Basilien-Gainche & Serge Slama, « [Droit d'asile \(Directive 2003/9/CE\) : Implications concrètes du droit des demandeurs d'asile aux conditions matérielles d'accueil dignes »](#) ») [Conversely, the ECtHR decision in the *M.M.S.* case (ECtHR, GC, 21 January 2011, *M.M.S.*, App. n° 30696/09) inspired the CJEU in the *N.S.* case (CJUE, GC, 21 décembre 2011, *N.S.*, C-411/10 & C-493/10 ; see Marie-Laure Basilien-Gainche, « [Les gens de Dublin ont des droits](#) »)]. The contrast is obvious between the European courts and the French national judges who are far from being attached to ensure the effective respect of the legal obligations the EU law and the European Convention impose to national authorities

Conclusion

After the deeply objectionable decision of the ECtHR in [N.D. & N.T. v. Spain](#) that admits the uneffectiveness of the *principe de non-refoulement* (ECtHR, GC, 13 February 2020, App. n° 8675/15 et 8697/15), the decision of the ECtHR in the N.H. case seems to be very welcome. Yet, the decision deceives. It doesn't reprove the vulnerability scale that is applied by the administrative authorities when deciding which asylum seeker can benefit from an accommodation, although all human beings need to be treated in a dignified way; it doesn't criticize the political will and its legal translation that organise the structural undersized national asylum system that explains the degrading treatment many asylum seekers are enduring in France (Karine Parrot, *Carte blanche. L'Etat contre les étrangers*, Paris, La Fabrique, 2019).

